

# THE SEX OF LABOUR LAW IN EUROPE

## LE SEXE DU DROIT DU TRAVAIL EN EUROPE

Edited by

**YOTA KRAVARITOU**

*European University Institute,  
Department of Law,  
Florence, Italy*



**KLUWER LAW INTERNATIONAL**  
THE HAGUE / LONDON / BOSTON

## Chapter VIII

# *Economic Independence, Labour Law and Social Security*

---

*by Rikki Holtmaat*

## 1. Introduction

As many others have already commented in this volume, it is useful to approach the matter of the gendered nature of labour law in relation to other fields of law. In this sense I do not feel embarrassed that most of my paper is about social security law rather than labour law.

I think we should not fall into the trap that has been set by traditional legal doctrine in separating different spheres of law and treating and studying them separately. In that respect we should follow Tove Stang Dahl, who prefers to speak of income law.<sup>1</sup> Income law covers many different fields, such as property law, divorce law, maintenance law, labour law, tax law and social security law.

In this paper I will draw on some recent work, for instance, my Ph.D. thesis and a recent article in a Dutch legal journal.<sup>2</sup> In the first part of this paper I will very briefly provide some background information on the Dutch governmental emancipation policy in respect of labour and income. After that I will concentrate on analysing the

---

1 STANG DAHL, "Women's Right to Money", *International Journal of the Sociology of Law* (1984) p. 137-152.

2 R. HOLTMAAT, *Met zorg een recht? De analyse van het politiek-juridisch verloop over bijstandsrecht* [To Care for a Right, the Analysis of the Political-Legal Discourse on Social Assistance], Zwolle: Tjeenk-Willink (1992); —ID., "De rode draad: Op zoek naar gefeminiseerd sociaal zekerheidsrecht", *Ars Aequi* (1992) p. 399-408.

---

concepts of economic independence and individualisation of income rights, especially social security rights. These concepts are also very important in respect to labour law.

In the third part of this paper I will examine further the feminist approach to economic independence and individualisation and I will show some of the dilemmas that occur when feminist lawyers or the women's movement take over these concepts without fundamentally challenging or changing their content.

## *2. Labour Participation and Social Security*

To begin with I will briefly examine the content of the Dutch official emancipation policy. There is a strong connection between this policy and the main demand of the women's movement: free entrance into the paid labour market. Two concepts are central in this respect: that of individualisation and that of economic independence. The desire for individualisation of income-rights is linked to the increasing number of women in the labour market. Women who have gained a certain amount of financial independence want to have individual rights that correspond to that independence. Individualisation is directly related to the concept of economic independence. The 1985 Government memorandum on future emancipation policy defines the latter concept as the situation in which every adult "will be able to provide for him/herself, be free to choose to enter into relationships and to take upon him/herself the responsibility for children".<sup>3</sup>

Although there have been attempts to arrive at a broader definition of economic independence by including unpaid caring, the concept remains one in which paid labour plays an important part. As far as the emancipation of women is concerned, economic independence

---

3      Beleidsplan Emancipatie, Tweede Kamer 1984-1985, 19 052, no. 2, p. 13.

---

and individualisation are part of what I have called the *theory of labour participation*: the theory that the liberation of women will mainly take place through increasing participation in the labour market.<sup>4</sup> This theory of labour participation is made up of four elements:

- 1.—If women have their own income, this will fundamentally undermine existing power relationships between men and women.
- 2.—Income can be obtained mainly through paid labour. Participation in paid labour is one of the most important conditions and opportunities for providing women with personal, social and political power.
- 3.—Social security is not a goal in itself, but performs a secondary function in replacing income for those who are unable to acquire it on their own behalf.
- 4.—The State can and must play a neutral role in distributing income and power among men and women.

Although increasingly the women's movement has voiced doubts about the 'liberating' or enjoyable nature of paid labour,<sup>5</sup> labour participation theory remains of great importance for the development of (feminist) strategies aimed at economic independence and individualisation in the field of taxation and social security. The theory even plays a double role: for on the one hand it postulates that the logical result of the predominance of paid labour (over social benefits) as a primary source of income, is that rights to social benefits replacing earned income should—like wages—be individualised.<sup>6</sup> On the other hand it postulates that social security should be individualised

---

4 See HOLTMAAT, "Individualisering van de sociale zekerheid", *Nemesis* (1984) no. 2, p. 62-69.

5 Indeed, some groups have turned their backs altogether on paid labour and now advocate a jobless existence. See for a recent example of a critique of the labour participation theory, WIERINGA, "Een mondiaal misverstand", *Nemesis* (1992) no. 2, p. 5-11.

6 See also *infra*, note 12.

because anything else would stand in the way of participation in paid labour by women.<sup>7</sup>

As far as social security is concerned, in 1984 the Council for Emancipation advised on the revision of the system and advocated a process in five different stages that can be summarised in the following definition: individualisation is the creation of equal and independent rights for each individual, regardless of other income in the unit in which that person lives and of which he/she is part, and regardless of the costs of the form of the unit in which a person chooses to live.<sup>8</sup>

During the eight years that have passed since this advisory memorandum, economic independence and individualisation have still not been realised in full and these are still the most important concepts in the debate on (re)forming the system of social security.<sup>9</sup> Although some changes have been made as far as social insurance for the employed and some national insurances are concerned that tend towards a more individualised system of rights to benefits, almost all political parties still oppose fully individualised rights to social assistance.<sup>10</sup>

More and more the impact of the Dutch emancipation policy, and of the law reforms that go with it, have been disputed among feminists. Women are forced to participate in paid labour without the conditions that make a combination of paid and unpaid work possible being met or being provided for. However, the basis of today's feminist claims is still very much the same "labour-participation theory". In this way reforms in labour law are very closely related to social security policy. This makes it important not to study both subjects

---

7 See HOLTMAAT, *supra*, note 4, p. 63 *et seq.* A non-individualised system includes breadwinner-allowances that disappear if the woman starts work. One must therefore first earn the allowance, before any financial gain attaches to being employed as a woman. The same applies to tax-free allowances for breadwinners.

8 See HOLTMAAT, *supra*, note 4, p. 63.

9 See *e.g.* the advisory memorandum of the Council for Emancipation, *Emancipatiebeleid in macro-economisch perspectief* from 1989, and the report *Een werkend perspectief* by the Wetenschappelijke Raad voor het Regeringsbeleid from 1990.

10 See the parliamentary committee (Uitgebreide Commissie Vergadering) of 16 September 1991, TK 1990-1991, UCV no. 60.

---

separately, but to go into the common basis of both these fields of law.

### *3. The Origins of Individualisation and Economic Independence*

In this section the origins of the concepts of individualisation and economic independence are traced back to the (internal) structure of both labour law and social security law. It appears that both concepts are rooted within these structures and are—as such—not ‘new’ or invented by the women’s movement.

#### *Individualisation*

The term individualisation can mean two entirely different things within the context of Dutch social security. As far as *social insurance* is concerned (insurance for the employed and national insurance) it means: an individual’s claims are determined regardless of family circumstances and means of subsistence within the family. Within the context of *social assistance* it means: benefits that are determined in accordance with the individual circumstances of the case. Family circumstances and means of subsistence within the family are important considerations in determining individual circumstances.<sup>11</sup> Demands for individualisation of social security such as are made by the women’s movement and the Council for Emancipation, correspond to individualisation in social insurance, and especially insurance for the employed. In their turn, individual rights to benefits in those insurances correspond to the individualised system of wages in the Netherlands. That is to say: family circumstances, such as whether the person concerned

---

11 See for the concept of individualization within social assistance, R. HOLTMAAT, *Het recht op bijstand*, Zwolle: Tjeenk Willink (1992).

is the breadwinner or how many children he/she supports, are not taken into account (any longer) in determining an employee's wage.<sup>12</sup> Benefits linked to wages (as is normally the case with insurance for the employed) do not therefore take such circumstances into consideration either. This is because these insurances are not based primarily on social solidarity, but on the principle of equivalence between wage, premium and amount of benefit. Both premium and benefit are related to the (individualised) wage.<sup>13</sup> Because social assistance is not financed by means of a premium, but by the Treasury from public funds, this form of social security has been called the most important form of security through 'pure' solidarity. There is no link at all between benefit and any previous wage because there is no element of premium. The true basis of a right to social assistance is not one's own individual *labour* (the value of which is expressed in one's wage) and the running of an accepted *social risk*,<sup>14</sup> but one's individual

---

12 It is forbidden to take family circumstances into account in that way in the Netherlands because of article 119 of the European Community Treaty, the first European Community directive and the 1975 Dutch Equal Pay Act. The fact that wages in Holland are nevertheless regarded as family wages is related to the link that exists between wages and benefits at a minimum level. The legally fixed minimum wage for an adult is regarded as sufficient for a "normal" family consisting of a breadwinner, a dependent partner and two children. At a minimum level social benefits should not therefore fall below the minimum wage. See HOLTMAAT, "De Januskop van het minimumloon", *Sociaal Maandblad Arbeid* (1988) p. 328-330.—For a recent political debate on this point, see TK 1990-1991, UCV no. 60, p. 22.

13 National insurance is not as strictly insurance-based as work-related insurance schemes. National insurance programmes are based on a system of flat-rate benefits in which allowances or benefits may be given to persons by whom, or on whose behalf, no premium has ever been paid (for example, housewives who receive old age pensions). In that sense they are also based on a principle of solidarity.

14 Two elements are central to insurance-based systems of social security: premiums paid out of labour-income and the acceptance of a social risk. The latter means that there is consensus about what income-risks cannot be carried by individual citizens but should collectively and compulsorily be insured through a legal system of social insurance. Unemployment, old age, sickness, severe disabilities and widowhood have been accepted as such. All of these risks are directly or indirectly (for widowhood) linked to paid labour. Within this concept of the insurable social risks a gendered pattern of classifications can be identified. Income risks that are related to unpaid labour are never accepted as "social" risks and are always situated in the private sphere. These risks are not deemed to be "impersonal" or "social" (that is:

(continues on next page)



---

*needs*. The substance of the concept of individualisation within the context of social assistance is therefore very different from that within the context of insurances for the employed.

### *Individualisation and Paid Labour*

As we have seen, the concept of individualisation in social insurance for the employed corresponds to individualised wages in the context of paid labour. We must therefore take a closer look at the world of paid labour in order to find out what individualisation means there. Some years ago I conducted research (within the framework of a research-project on the legal nature of flexible labour-relations) on the meaning of the concept 'employee' in Dutch labour law.<sup>15</sup> In that project it became clear that the concept of an *employee* in labour law is an *individualised* concept. That is to say that the law assumes that in his/her relationship to an employer, an employee is regarded as an individual, independent of family circumstances and the like.<sup>16</sup>

Further analysis of labour law—in the light of the legal position of so-called flexible employees—shows that the model-employee in labour law is the person who works full-time between the ages of 20 and 65 on the basis of a regular labour contract. The legal position of part-time workers and 'flexible' employees is derived from this 'normal' pattern. I use inverted commas because this situation is increasingly abnormal for part of the Dutch population. It never was

---

guiltless) but personal (that is: caused by personal circumstances or fault). See R. HOLTMAAT, *Met zorg een recht?*, *supra*, note 2.

15 See HOLTMAAT, "The Power of Legal Concepts; Towards a Feminist Theory of Law", *International Journal of the Sociology of Law*, no. 5 (December 1989) p. 481-502;—ID., "Individualisering en verzorgingsbehoefte", *Sociaal Maandblad Arbeid* (1987) p. 760-774;—ID., "Naar een Ander Recht", *Nemesis*, no. 1 (1988) p. 3-13.

16 Until recently, there was only one provision in the law that obliged an employer to look further than the person employed: art. 1638c of the Civil Code which contains contingency provisions for calamities in the private sphere. Of late, a ruling has been introduced which obliges employers to allow an employee (if he/she so desires), unpaid part-time leave in connection with parental duties for a maximum period of six months (1638oo Civil Code).

'normal' for most married women anyway. In so far as they participate in paid labour, they usually work part-time, on the basis of a 'flexible' contract or as 'black'-labour in household cleaning, etc. Only those who can rely on the unpaid labour of others (mothers, wives, neighbours) or who earn enough to let others undertake such labour for a fee, can maintain a 'normal' pattern of work. People who are on their own, or partners with two full-time jobs find it difficult to maintain such a pattern, especially if children or others are dependent on their care. The employer can proceed on the basis of the model-employee as an individual without obligations at home, because in practice only such individuals can actually undertake paid labour: those who have no-one dependent on their care, or who have others to do the caring and nurturing. In other words, the individualised model of paid labour assumes that those who work for a wage have someone else to take care of them, in exchange for which the carer shares the employee's income. This form of individualised labour only exists by the grace of unpaid labour (mainly of women). This model of labour is really then a breadwinner's model.

The demand for individualisation of social security benefits to correspond to an individualised model of paid labour therefore gives rise to a strange paradox: that individualised model is actually a breadwinner's model, and is not really individualised at all. From a feminist point of view, demands for individualised social security to correspond to it, will always be problematic. For how do we take account of the unpaid caring, for oneself and for others, that everyone is faced with, within an individualised system of wage-fixing and social security? What happens if a person is unable to earn (sufficient) individualised income because of caring, or is unable to accumulate sufficient individualised rights to social security (as happens to many part-timers)? These questions are not addressed by a strategy of individualisation.

## *Economic Independence*

What about economic independence? Is this also a concept that derives from the world of social insurance, and what does it mean there exactly?

In a social sense, the concept "economic independence" has gone through an important development during the past hundred years. Economically independent used to mean that people were able to keep themselves by their own capital or business ("independent means"), rather than being dependent on a wage. The concept now refers mainly to persons who are able to provide for themselves through paid labour of some sort, and who are not dependent on family or State support. People who are economically dependent have little or no access to paid labour and are dependent on those members of their family who are obliged to support them, or (if no family support is forthcoming) on a minimum income provided by the State (such as social assistance).

We see economic (in)dependence in this sense in social security. It comes to light if one examines the question of why social *insurance* should play such an important part in the social security system. Research into why a system of social insurance should in general be preferred over a system of social assistance, shows that there are two sorts of motives for this preference which are related to the concept of economic independence in the (double) sense of independence by means of paid labour and independence from family or State income.<sup>17</sup>

The first motive concerns the value of paid labour for the citizen's (economic) independence and autonomy. Only those who earn their living through paid labour (either self-employed or in the employment of others) are socially independent "*in the full sense of the word*", as

---

17 See on this question, R. HOLTMAAT, *Met zorg een recht?*, *supra*, note 2.

the author of a Ph.D. on social security put it in 1957.<sup>18</sup> As I have already said, the predominance of paid labour is part of the labour participation theory in emancipation circles. In 1984, the Council for Emancipation was still advising that paid labour should precede income from benefits, if economic independence were to be acquired and maintained.<sup>19</sup> Central considerations in the motive for allowing labour to take precedence over social security are self-respect (in the sense of not having to say "thank you"), 'existential' security, equality, (economic) independence, an independent status and responsibility. These enviable qualities may also fall upon ex-employees in so far as they are insured under social insurances for the employed or National Insurance schemes. The direct link between paid labour and social security (via the payment of premiums) implies that wage-related benefits, for which the entitled person has paid premiums, are to be preferred over benefits based on 'pure solidarity', such as social assistance. The person who is (or has been) willing to undertake paid labour, but who falls victim to a recognised social risk (such as illness or unemployment) *deserves* an independent right to social benefits that also maintain his/her economic independence.

The second motive for distinguishing between wage-related benefits and needs-related benefits such as social assistance, is to be found in the significance attached to independence from family income. The family means test that is part of social assistance, is regarded as an important barrier to the construction of an *independent right* to social assistance benefits. The concept of an independent right means, in respect to social security, that anyone with a right to social security payments does not need family support.<sup>20</sup> Put the

---

18 A. HEERING, *Eenheid en verscheidenheid der sociale uitkeringsregelingen*, Ph.D. thesis, Groningen (1957) p. 72.

19 See advisory memorandum *Sociale zekerheid en Emancipatie*, Den Haag: Emancipatieraad (August 1984) p. 10.

20 ID., *supra*, note 18, p. 117. In Holland this is no longer a barrier to the claim that there is a *right* to social assistance. This right however is never seen as an *independent right* but as a "family-right" to get family support. The concept of a right to social assistance is very problematic. See the last part of this paper where I discuss this "rights-talk".

---

other way around, a person with an independent right to social security payments can never be subjected to a family means test and is therefore able to remain independent of his/her closest relations. Social insurance programmes are constructed in terms of independent rights. Because insurance premiums have been paid, the social insurance benefits can never depend on whatever financial means one's family happens to have. By paying a premium, one 'buys', as it were, one's own financial independence. This allows a person to feel independent. "If one is forced to live on benefits, one can nevertheless be safe in the knowledge that one is independent." Instead of being an object of charity, the person receiving wage-related benefits is a "person and a fellow citizen".<sup>21</sup> This is not merely an old-fashioned or obsolete view of the nature of social insurance, as can be seen from the heated debate on the Disablement Insurance Act that took place in Parliament in the summer of 1991 after the Lubbers-Kok-Cabinet had proposed cuts. Because they once paid premiums for the right they now exercise, the Government cannot simply transfer those with disability benefits to social assistance. The quality of disability benefits is regarded as definitely 'better' than that of social assistance benefits, and the family means test for social assistance is mainly responsible for that.

### *Economic Independence and Unpaid Labour*

The substance of the modern concept of economic independence is the result of a combination of these two reasons for maintaining the distinction between social insurance and social assistance and for regarding social insurance as the *better right*. Economic independence in the sense of: 1) acquiring income through labour or a wage-related allowance and 2) not having to be financially dependent on one's close relations, is not therefore a 'new' concept, neither was it invented by the women's movement. Rather, its meaning derives from the very construction of our system of social security: a system that

---

21 A. HEERING, *ibid.*, *supra*, notes 18 and 20.

puts paid labour and wage-related social insurance benefits first, and that regards social assistance for people who have never participated in the labour process, or who have not done so for a long time, as its rock bottom. As a matter of principle, such central concepts as personal responsibility and independence do not apply to those who are dependent on social assistance.

There is a paradox here, as there is with regard to the concept of individualisation. The concept of economic independence is based on certain values, such as the realisation of personal responsibility through paid labour, and an individual's autonomy with regard to his/her primary environment. These are values about which the women's movement has voiced fundamental doubts, because they are seen as 'male'. That is to say, they are values that are based on a male pattern of life and on the experiences of men. One could ask whether, by making the concept of economic independence the spearhead of its social security strategy, the women's movement has not (unconsciously) embraced these male values.

A second problem concerns the fact that the demand made by the women's movement corresponds to existing social and economic practice in which, as yet, women have been unable to build up independent rights to income and benefits because of the reproductive and caring functions they are assumed to (want to) fulfil. If women want to become economically independent, in the sense in which the concept has been used here, they will have to either stop fulfilling these traditional tasks, take on a double load in life, or share these tasks with their partners. In most cases the last option still means a daily fight about washing up and (more a matter of principle) about who is to maintain the full-time job and who is to work part-time as soon as a child is born. Although young women especially are optimistic about the chances of being able to share unpaid labour, and about the willingness of men to do so, figures show that in reality women are still the regular losers in 1992. Of all mothers with young children, only 25 % have a paid job, mostly part-time. Fathers with

---

young children certainly do not give up their jobs, and very few take on part-time jobs.<sup>22</sup>

### *Economic Independence, Individualisation and Unpaid Caring*

We have seen that the concepts of individualisation and economic independence are closely linked to paid labour, and especially to the form of social security that is related to paid labour: social insurance. Demands for economic independence for women who have not yet participated (sufficiently) in paid labour to be eligible for social insurance benefits, have always met with political unwillingness: there is said to be no way that social assistance, which is what these women have to fall back on as a last resort, could be individualised so as to guarantee economic independence for everyone, in the sense of independence from one's partner.<sup>23</sup>

Political scientist Jet Bussemaker, who researched the history of demands for individualisation with regard to social assistance, maintains that the demands drowned in a sea of rhetoric. Social assistance is said to be a matter of responsibility and caring for others (needy citizens) and of solidarity, not of subjective and individual rights.<sup>24</sup> Individualisation is said to lead to selfish, calculating citizens and to atomism: social ties will fall apart. Solidarity must remain the basis of social assistance, because it enables the expression of citizens' responsibilities for their fellow citizens (certainly in their primary—family—environment).

---

22 See for (revealing) figures in this field, M. NIPHUIS-NELL, *De Emancipatie van Meisjes en Jonge Vrouwen*, Den Haag: Sociaal en Cultureel Planbureau (1992).

23 Social assistance is individualised in the sense that the benefits are determined in accordance with the individual (family) circumstances.

24 BUSSEMAKER, "De bijstandswet: van kroonstuk tot kind van de rekening", in C. BOUW (ed.), *Macht en Onbehagen; Veranderingen in de verhoudingen tussen mannen en vrouwen*, Amsterdam: SUA (1991) p. 195-207.

In other words, there is a huge gulf between demands for economic independence and individualisation (concepts which correspond to paid labour and social insurance) and social assistance. However, the problem is that economic independence and individualisation are, or can be, of paramount importance to those dependent (in the last resort) on social assistance. These are the people who have no access to paid labour and who are completely or partially dependent on family support or social assistance. These people are economically dependent in the modern sense.

Social assistance is a social safety net for people who have never worked for a wage or have been out of the labour market for a long time. They include the long-term unemployed, but also many divorced women with children. Their claim to social assistance is not based on the fact that they have paid for it (premiums), but on 'pure solidarity'. That is to say that the unpaid labour that these women perform, which is precisely the reason why they have often become dependent on social assistance, does not render them 'deserving' of an independent right to an allowance.

We have seen that the system of individualised social insurances for the employed is based essentially on an individual who is a male breadwinner and who can rely on someone else to perform his unpaid labour, or on an untied individual with little or no caring to do. Our system of social security takes unpaid caring by women into account in the supplementary allowances that breadwinners receive for non-earning partners (Old Age Pension supplements and the Supplementary Benefits Act), and in the Social Assistance Act. Those who are not (or no longer) able to be economically independent because of unpaid caring receive social assistance as a last resort—if they are also no longer entitled to alimony. The fact that unpaid caring is taken into account in this way will be further undermined if demands for individualisation result in supplementary allowances and so-called derived rights disappearing, and in the partners of those dependent



---

on supplementary benefits and single mothers on social assistance thereby being forced into paid labour.<sup>25</sup>

#### ***4. A Feminist Approach to Economic Independence and Individualisation***

I now want to go a little further into the question of how feminists approach the subject of economic independence and individualisation.

As to individualisation, I can be brief. In Holland this concept refers to making all entitlements to income, income protection or income taxation totally independent of any family means-testing. This concept refers directly to the way individualisation has already been structured in social insurance schemes. As I have pointed out, these schemes are based on an individual wage and an individualised wage-contract. As such it throws us into a dilemma concerning how we should treat care in the context of social security or income law.

As to economic independence: the Dutch women's movement and even official emancipation policy has always conceptualised economic independence as a double concept, meaning that any adult person should be able to maintain his/her independence in financial and in care matters. The dimension of care is new, compared with the content of economic independence in the context of social security and labour law. However, the feminist movement tends to let the aspect of care slip away as soon as they talk of economic independence in relation to social security rights.

---

<sup>25</sup> In Holland the demand for individualisation in the field of supplementary allowances and social assistance has not yet led to any form of independent rights for women, but has provoked much discussion about how women should try to get paid labour instead of relying on the husband's supplementary allowance or on social assistance. The Government now actually makes it impossible for younger generations to apply for such allowances and puts more pressure on divorced women to start working again.

---

Up till now care has not been considered in the sphere of social security that guarantees economic independence, that is, in social insurance schemes. But—as I pointed out above—care has been very well considered in that part of the social security system that has no reference to economic independence: supplementary benefits and social assistance programmes. That means that care has been taken into account in the means tested part of the social security system which is based on the fact that some people are economically dependent (that is: persons with little or no access to paid work who are financially dependent on the family or the State).

The claim to ‘individualise’ social assistance in Holland draws not only upon a social insurance-based concept of individualisation and economic independence, but also upon “rights-talk”. It means that the concept of a right to social assistance<sup>26</sup> must be broadened to an *individual* or *independent* right (not just a right of the family to get enough family support!). Although entitlements to social insurance payments as well as entitlements to social assistance payments both are termed ‘rights’, the legal justification for the two is fundamentally different. Within the field of social security a distinction can be made between rights-based and needs-based or obligatory entitlements or rights. On the one hand we have rights-based social insurance programmes, on the other hand we have needs-based social assistance programmes. In my Ph.D. thesis I analysed the difference between these types of social security entitlements. If rights are conceptualised as personal, subjective rights of the person, one can have very serious doubts about framing the legal entitlement to social assistance in terms of rights. Unlike social insurance payments, in which the conceptualisation of the entitlement in terms of rights is not unusual or “contra legal sense”, the framing of the entitlement to social assistance as a personal, subjective right goes very strongly against a legal common sense as to what subjective or personal rights are about. The habit (in Holland) of speaking of a ‘right’ to social assistance mainly serves the purpose of setting at ease people who feel embarrassed about the charitable nature of social assistance. As such

---

26 Which has been accepted formally in Holland.—See also, *supra*, note 20.

---

the right to social assistance is more a symbolic right than a legal entitlement.

Not only does the concept of a right to social assistance fundamentally clash with traditional liberal notions which see right-holders as autonomous and free citizens, this concept also creates a few severe legal problems for social assistance claimants. Two of these I want briefly to deal with here.

The first difficulty is that we can hardly think of rights without obligations or duties. In the field of social insurance, the duties that correspond to the individual's right to a benefit are already fulfilled when the social risk that brings the right into effect occurs. Being employed for some period and having paid premiums are the basic duties that *constitute* the right to social insurance payments when sickness or unemployment occurs. The fulfilment of those duties makes it possible to speak of *deserving* recipients of social security.

Now what about the right to social assistance? How are the duties conceived of in this context? As unpaid work has never been considered a social duty that can deliver the goods (that is: the right to social assistance), in the case of social assistance the duties that go along with the right to social assistance are born at the moment one applies for it. This means that a very severe set of disciplinary norms of behaviour can be imposed upon the social assistance claimant in the name of him/her having to fulfil the duties corresponding to his/her right.<sup>27</sup>

Given that this is the consequence of the construction of a social assistance *right*, it is highly questionable whether we should claim that *needs* could be the basis of people's individual subjective rights. The Dutch Government has now stipulated the formal right to social assistance in a reform Bill, whilst at the same time imposing a new set

---

27 This is exactly how the introduction of a formal "right" to social assistance in the Social Assistance Act has been defended by the Minister of Social Affairs, who proposed it. People who have a right to social assistance can be asked to fulfil conditions or duties, such as becoming a member of the Alcoholics Anonymous (AA) or participation in a drug-addict programme.

of duties on social assistance claimants. Many of these duties constitute direct breaches of the fundamental civil rights of social assistance claimants (like the right to an undisturbed family life). Many other duties constitute indirect breaches of such rights (like the cohabitation rule constituting a danger to the right to privacy).

Here we see why a needs-based system of law is also so much an *obligatory system*. Claiming a right to social assistance might mean that you have to give up many of your civil rights and leaves little or nothing of your civic autonomy.

The second problem I will briefly deal with is the problem of contextuality that is linked to needs-based rights-thinking. Contextuality can be—and indeed has been—put forward in a feminist approach to law as a panacea for all the bad, individualistic and abstract features of traditional liberal law. The inclination towards contextuality can, for instance, be found in the work of Martha Minow.<sup>28</sup> Contextuality is almost a pre-given route (which you seem unable to escape) if you plead for a more needs-based system of law.<sup>29</sup> One can only see what needs should be met by law if the individual's context is taken into account. This inclination towards contextuality is not without serious dangers however. I can again illustrate this point with reference to the case of social assistance.

Social assistance programmes are—by definition—linked to context. To see whether a person is in need of a benefit, the welfare bureau has to look into the circumstances of the individual case. There are no formal or general rules that dictate how much and what form of social assistance is suitable in each individual case. In this sense every decision of the welfare bureau is 'contextual'. But does that do any good for the women who are dependent on them? I think not. The chief characteristic of context-linked programmes is that they are not ruled by formal or general rules, but that they leave a great deal of

28 M. MINOW, *Making All the Difference*, Ithaca/London: New York Cornell University Press (1990).

29 See I. M. YOUNG, *Justice and the Politics of Difference*, New Jersey: Princeton University Press (1990), especially where she speaks of "the politics of needs interpretation".

---

discretion to the civil servants or social workers who have to carry out the programme. And this discretion leaves them with a lot of power!

As long as the women who are dependent on social assistance are not the ones who have the power to define: *a*) their needs and *b*) what specific context or personal circumstances are deemed to be relevant, this type of contextuality renders them powerless against the State or State agents defining them as "welfare-mothers".

## 5. Conclusions

This paper contains more dilemmas and questions than it contains answers. What I wanted to show is that before entering into the construction of new feminist claims concerning "income law" we should first examine the old existing concepts and structures of the main parts of income law: labour law, family law and social security law. In this paper I concentrated on social security law. Important concepts that are used by the women's movement stem from the old gendered patterns of thought in social security law. These concepts (like individualisation, economic independence and the insurable social risk) cannot be used without the danger of engendering new dilemmas and pitfalls for women. There is no 'simple' way out, as the claim of individualisation of all social security programmes (including social assistance) would suggest. In particular, the demand for the individualisation of social assistance is very problematic, not only because it meets with a lot of political resistance, but also because it causes some serious legal problems for the people who are dependent on it. The seemingly equally 'simple' demand of changing the foundations of a legal claim or 'right' from merit (or paying premiums) and social risks to *need* also generates various serious dangers for women.

A fruitful co-operation between specialists in labour law and social security law can perhaps contribute to solutions to the dilemmas and pitfalls that I have described in this paper.